RECEIVED

SEP 1 2 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C.

| | | |
|---|---|---|
| In the Matter of<br><br>Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services | )<br>)<br>)<br>)<br>) | CC Docket No. 94-54<br>RM-8012 |

## COMMENTS OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

Michael F. Altschul
Vice President, General Counsel

Randall S. Coleman
Vice President for
Regulatory Policy and Law

**CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION**
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

Philip L. Verveer
Melissa E. Newman
Jennifer A. Donaldson
**WILLKIE FARR & GALLAGHER**
Three Lafayette Centre
1155 21st Street, Suite 600
Washington, D.C. 20036-3384

Of Counsel

September 12, 1994

## TABLE OF CONTENTS

## SUMMARY

Because of the dynamic, competitive nature of the commercial mobile radio services ("CMRS") marketplace, the Commission should refrain from imposing equal access and interconnection obligations on cellular and other CMRS providers. Equal access and interconnection obligations were intended to apply in limited circumstances where firms exercise persistent, substantial market power. Only in those limited situations do the benefits associated with such obligations override the costs. In the case of the CMRS, such obligations can have adverse effects on consumer welfare and should not be adopted.

In those limited circumstances where interconnection is warranted, i.e., LEC interconnection with cellular and other CMRS providers, mandated tariff obligations are unnecessary. The current system of LEC/cellular good faith negotiations should be extended to LEC negotiations with all CMRS providers. In this regard, CMRS providers will be adequately protected from discriminatory LEC practices while market participants will retain the needed flexibility to fashion mutually beneficial interconnection arrangements.

Finally, to ensure continued regulatory parity among commercial mobile services, the Commission should extend to all CMRS providers the same resale obligations currently applicable to cellular licensees.

RECEIVED

SEP 12 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C.

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services | ) ) ) | CC Docket No. 94-54<br>RM-8012 |

**COMMENTS**
**OF**
**THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The Cellular Telecommunications Industry Association ("CTIA")[1] hereby submits its comments in the above-captioned proceeding on issues regarding equal access and interconnection obligations of commercial mobile radio service ("CMRS") providers.[2] Given the importance of this rulemaking to the continued success of wireless communications, CTIA and its members are interested parties to this proceeding.

---

[1] CTIA was established in 1984 as the trade association of the cellular industry. Today, CTIA represents the wireless industry, with membership open to all members who provide commercial mobile radio services. CTIA's members include over 95 percent of the licensees providing cellular service to the United States, Canada, and Mexico, as well as the nation's largest providers of enhanced specialized mobile radio ("ESMR") service. CTIA's membership also includes cellular equipment manufacturers, support service providers, and others with an interest in the wireless industry.

[2] Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, RM 8012, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 94-145 (released July 1, 1994) ("Notice").

## I. INTRODUCTION

During the past decade, wireless service markets have undergone a dramatic transformation with the emergence of new technologies that permit significant increases in output and capacity.[3] Digital and compression technologies, for example, will greatly expand the capacity of all wireless telephony, thereby enhancing the speed and reliability of wireless networks.

In addition, the wireless marketplace is currently characterized by competition, with concomitant reductions in price and increases in quality. And, with personal communications services ("PCS") and ESMR providers poised to offer nationwide voice, data, and paging services, competition for wireless services will continue to flourish.[4]

To continue these trends in the wireless industry, it is imperative that all competitors not be hindered by needless regulations and restrictions. In this regard, CTIA notes that

---

[3] In 1984, the cellular industry comprised only 32 licensed systems that served approximately 92,000 subscribers. Today, there are more than 19 million subscribers. Throughout this period of growth, the price of cellular service has dropped. Between 1985 and 1994, cellular service prices decreased by 13 percent in nominal terms and 35 percent in real terms in the top 30 metropolitan service areas. See Affidavit of Jerry A. Hausman, MacDonald Professor of Economics at the Massachusetts Institute of Technology at para. 35, attached to Motion of the Bell Companies for a Modification of Section II of the Decree to Permit Them to Provide Cellular and Other Wireless Services Across LATA Boundaries, United States v. Western Elec. Co., No. 82-0192 (D.D.C. June 20, 1994).

[4] The Commission has estimated that within ten years, PCS subscribership will exceed 60 million subscribers. Amendment of the Commission's Rules to Establish New Personal Communications Services, 7 FCC Rcd 5676, 5688 (1992).

wireless services are fundamentally different from traditional landline services. Whereas the local exchange carriers ("LECs") maintain control over bottleneck facilities, wireless providers do not. While it is necessary to impose equal access and interconnection obligations on LECs to counter their historical competitive advantage, such obligations are ill-advised in a competitive wireless marketplace.

## II. EQUAL ACCESS REQUIREMENTS SHOULD NOT BE IMPOSED ON CELLULAR LICENSEES OR OTHER CMRS PROVIDERS.

In the Notice, the Commission tentatively concluded that it should impose equal access obligations on cellular licensees despite the fact that three of the five Commissioners expressed concern about the wisdom of extending equal access obligations to cellular carriers.[5] It further seeks information on the costs

---

[5] Notice at para. 3. See also Separate Statement of Commissioner James H. Quello:

> My over-riding concern is that we are proposing to impose regulatory structures borne of the MFJ, itself the product of a vastly different market structure, on new and emerging industries such as PCS. I believe that we should be asking how a competitive market for mobile communications will allow us to remove regulatory impediments rather than grafting regulatory stop-gap measures upon a family of services yet to be developed and offered by competitors to the public.

Separate Statement of Commissioner Andrew C. Barrett:

> [T]he rationale for imposing equal access obligations in the context of 'bottleneck facility' market power is not apparent here. Nor does there appear to be a future trend toward further consolidation of market power in the wireless area. In fact, given the greater level of competition that could occur, we may decide that there is no basis for imposing MFJ type of equal access obligations on multiple CMRS providers,

and benefits of imposing such obligations on any other class of CMRS provider. Given the competitive environment in which CMRS operates and the fact that neither cellular licensees nor other CMRS providers have control over bottleneck facilities, it is unnecessary to impose equal access obligations on cellular licensees or other CMRS providers. Moreover, such obligations may produce perverse incentives on toll price competition as well as impede the development and deployment of new wireless services and technologies.[6]

---

including cellular.

Separate Statement of Commissioner Rachelle B. Chong:

> The Commission's tentative conclusion regarding equal access obligations for cellular licensees is the product of our present understanding of the current position of cellular service in the larger CMRS marketplace. That marketplace, however, is evolving rapidly towards a more competitive model. . . . We do not know at this time precisely what new services will take hold, what new competitors will enter the CMRS market, or what new forms of competition will develop. These issues . . . may present implications for the competitive position of cellular service providers within the broader CMRS marketplace.

[6] In the CMRS Second Report, the Commission found the CMRS marketplace to be sufficiently competitive to refrain from imposing tariffing and other burdensome common carrier obligations on all CMRS providers, including cellular. See Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411, 1467, 1478 (1994) ("CMRS Second Report") ("[T]here is no record evidence that indicates a need for full-scale regulation of cellular or any other CMRS offerings").

### A. Equal Access Requirements Have Consistently Been Imposed Only In Markets Where There Is A Lack Of Competition.

Prior to imposing equal access obligations on communications service providers, historically decisionmakers have first determined the extent of competition within the relevant market. In cases where the Commission has imposed equal access requirements on carriers, there has been an absence of competition in the relevant market. In the case of CMRS, however, the opposite is true. Competition among wireless services is thriving and will continue to flourish as new services and technologies are introduced and providers of such services are licensed.

Equal access was designed to address a specific problem -- eliminating anticompetitive activities in the long distance market resulting from the LECs control of bottleneck facilities. The AT&T consent decree did not contemplate the provision of wireless services nor were they the focus of any of the negotiations of the terms and conditions of the proposed decree. Because competition exists for commercial mobile services and cellular carriers do not possess control over bottleneck facilities, the bottleneck theory that supports the imposition of equal access obligations is not applicable here. Furthermore, under the existing cellular market structure, equal access obligations could create perverse effects on price competition for toll service.

Beginning with the Modification of Final Judgment ("MFJ"), a finding of sustained market power (i.e., the ability to raise prices by restricting output) has been the necessary prerequisite for imposing equal access obligations.[7] The MFJ court imposed equal access on the Bell Operating Companies ("BOCs") to remove the anticompetitive remnants of a Bell System in which AT&T enjoyed uniquely privileged access to the BOCs' landline networks[8] and to reduce the anticompetitive effects of the BOC-controlled bottlenecks to the provision of long distance service.[9] Fearing that the BOCs could use their cellular networks to circumvent the MFJ prohibition against BOC provision of interexchange service, the MFJ court also extended equal access to most BOC-affiliated cellular operations.[10]

Subsequent decisions to impose equal access obligations were similarly based on the degree of competition in the relevant market. In the case of the independent telco landline networks, the Commission imposed equal access because independents often possessed sole control over the long distance companies' access

---

[7] See United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982); aff'd mem. sub nom. Maryland v. U.S., 460 U.S. 1001 (1983).

[8] See id. at 195.

[9] See id. Similar reasoning caused the same court later to impose equal access obligations on GTE's landline local exchange facilities. See United States v. GTE Corp., 603 F. Supp. 730 (D.D.C. 1984). Significantly, the court found no similar justification for extending these obligations to GTE-affiliated cellular companies.

[10] See United States v. Western Elec. Co., 797 F.2d 1082, 1086 (D.C. Cir. 1986).

to their customers.[11] In another proceeding, the Commission imposed equal access obligations on operator services/pay telephone providers ("OSPs"),[12] after determining that there was a lack of competition within areas controlled by "call aggregators."[13]

As is apparent, it was the absence of competition that compelled the decisionmakers to impose equal access obligations on regulated entities. The CMRS marketplace, however, is fundamentally different. Competition for wireless services currently exists and will grow substantially over the next few years as new services and technologies are developed and deployed.

Furthermore, in contrast to encouraging long distance competition, the extension of equal access obligations to cellular carriers could create perverse effects on price competition for toll service and thus reduce the availability of lower priced alternatives currently offered to consumers. For example, in many regions of the country, cellular carriers, such

---

11 See MTS/WATS Market Structure (Phase III), 94 FCC 2d 292, 298 (1983).

12 See Policies and Rules Concerning Operator Service Providers, 6 FCC Rcd 2744 (1991); Telecommunications Research & Action Center & Consumer Action v. Central Corp. Int'l Telecharge, Inc., 4 FCC Rcd 2157 (Com. Car. Bur. 1989); Telephone Operator Consumer Services Improvement Act, 47 U.S.C. § 226 (1991).

13 See e.g., Policies and Rules Concerning Operator Service Providers, 6 FCC Rcd 4736 (1991). Specifically, the Commission, found that OSPs controlled local bottlenecks that resulted in such practices as call "splashing," made worse by the substantial lack of customer information.

as GTE Mobilnet, Contel Cellular, and Mountaineer Mobile have established wide local calling plans which allow a customer to place an end-to-end call over large areas without the additional charge from a long distance provider.[14] But equal access obligations, by necessity, require the establishment of service boundaries -- points of demarcation beyond which interexchange carriers must handle transmissions. Imposition of these boundaries would prevent consumers from making toll-free calls. Similarly, it would prevent cellular carriers from expanding local calling areas.

For many consumers who are now able to make toll-free calls, equal access obligations would increase the price of service by eliminating lower priced alternatives to conventional toll service. In such cases, instead of fostering long distance competition, equal access requirements would act as a shield to protect interexchange carriers from toll competition.

**B. The Competitive Structure of The CMRS Marketplace Dictates Against The Imposition Of Equal Access Obligations.**

In the CMRS Second Report, the Commission found that the CMRS market is competitive.[15] Judge Greene reached a similar conclusion in United States v. Western Elec. Co., Inc.,[16] finding

---

[14] Calls within the wide area calling plan are billed as local calls. GTE, for example, offers wide-area (toll-free) calling plans in Texas, Indiana, Florida, Tennessee, Virginia and California.

[15] CMRS Second Report, 9 FCC Rcd at 1467-1468.

[16] No. 82-0192, slip op. (D.D.C. Aug. 25, 1994).

that unaffiliated cellular systems and cellular systems owned by BOCs outside of their local exchange regions "do not constitute bottleneck monopolies[.]"[17] Thus, unlike previous situations where the Commission mandated equal access due to the absence of competition in the relevant market, competition plainly exists for commercial mobile services.

There are many wireless services that currently or soon will compete with cellular. ESMR services, for example, already provide an alternative to cellular in California and are scheduled to be available in other parts of the country in the very near future. This competition is becoming increasingly vigorous as the consolidation of radio frequencies, digital technology, multiplexing technology and multiple base stations increase ESMR's capacity, expand its service offerings, and improve its quality.[18]

As explained by Dr. Jerry A. Hausman, MacDonald Professor of Economics at the Massachusetts Institute of Technology, ESMR "will provide a close substitute to cellular service and will increase overall competition."[19] Moreover, PCS will shortly

---

[17] Id. at 17-18.

[18] See Stanley M. Besen, Robert J. Larner & Jane Murdoch, "An Economic Analysis of Entry By Cellular Operators Into Personal Communications Services," submitted as an Appendix to CTIA Comments in Gen. Docket 90-314, at 37-38 (November 1992).

[19] See Affidavit of Jerry A. Hausman, United States v. Western Elec. Co., Civil Action No. 82-0192 at 15-16 (July 29, 1992) ("Hausman Affidavit"). See also Anthony Ramirez, A Challenge To Cellular's Foothold, N.Y. Times, April 1, 1993, at C1, C5 (ESMR viewed as a powerful potential competitor to cellular); Edmund L. Andrews, Radio Dispatchers Set to Rival

provide strong competition to the cellular industry.[20] In addition, "the business of supplying cellular telephone communications has been characterized by rapidly increasing volume, declining prices, expanded service offerings, and significant technological change."[21] Cellular service is available on a competitive basis at the retail level[22] and cellular subscribers can choose between facilities-based cellular companies and cellular resellers, each of which offers long distance service.

Ubiquitous access to long distance services can be obtained today without imposing equal access requirements. The use of 800 and 950 numbers, as well as 10XXX, access permits users to reach the interexchange carrier of their choice. Furthermore, approximately 95% of the population in the nation's 50 largest

---

Cellular Phones, N.Y. Times, November 5, 1993, at D4 (Nextel "plans to compete directly against cellular companies"); Cheryl A. Tritt, Written Statement in the Hearing Before the California Legislature Senate Committee on Energy and Public Utilities (Jan. 12, 1993) ("Advances in digital technology will allow SMR to develop cost-effective services that are likely to compete directly with cellular.").

[20] See Hausman Affidavit at 15-16. Auctions to award narrowband PCS licenses have already begun. Broadband PCS auctions are scheduled to begin soon.

[21] See Stanley M. Besen, Robert J. Larner & Jane Murdoch, "The Cellular Service Industry: Performance and Competition," submitted as an Appendix to CTIA Comments in Gen. Docket 90-314, at 1 (January 1993). See also Hausman Affidavit at 7, 9-14 (analyzing the competitive nature of the cellular market, the high degree of quality and price competition, and the fluctuation in market share).

[22] See Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 FCC Rcd 4028 (1992).

markets enjoys the option of choosing BOC-affiliated cellular service, which is subject to equal access requirements, thereby reducing the need for further equal access obligations on other CMRS providers.[23]

With the advent of new wireless services, such as PCS, and the introduction of wide-area SMRs competing with cellular, the marketplace will determine the need for equal access. If the market so dictates, independent cellular licensees also will offer equal access to long distance services to gain a competitive advantage. The fact remains, however, that independent cellular licensees have been competing successfully with BOC-affiliated cellular providers in the absence of equal access obligations. And, there appears to be no measurable demand by consumers of unaffiliated cellular carriers to offer equal access. The lack of competitive response by such carriers indicates that there has not been a loss of substantial number of customers to BOC-affiliated competitors. Yet, if there were, unaffiliated cellular carriers would presumably offer such access to their customers in order to maintain their competitive position.

### C. Equal Access Obligations Could Thwart The Development Of New Services And Technologies And Impose Costs On Cellular Licensees And Other CMRS Providers.

In addition to the lack of consumer demand for equal access, imposition of such requirements could damage existing cellular

---

[23] In addition, equal access is provided by AirTouch Communications and it appears that McCaw will provide equal access as well.

service and have a crippling effect on the development and deployment of new services and technologies. While equal access has been a success in opening the long distance market to competition following the divestiture of AT&T, the principles of equal access are based on 15 year-old technology and on a 15 year-old network architecture. As such, equal access requirements do not fit with the "advanced intelligent network" ("AIN") and packet data networks of today.

For example, in the recent investigation of AT&T's proposed acquisition of McCaw Cellular, the Antitrust Division of the Department of Justice concluded that CDPD service, a form of packet data service offered by McCaw, could not be provided efficiently pursuant to an equal access obligation as it would degrade the existing packet data services and make them more expensive.

> The United States understands that the transport cost for packetized data, especially that using the Internet Protocol, is small in comparison to other elements of the service, and thus, this service could be economically justified more easily (in more locations) if providers did not need to implement [equal access - mandated] switching or routing points in each local Cellular Service Area. . . . Finally, the Internet Protocol does not have any provision for indicating a customer's choice of access provider and thus it would make use of the CDPD service less convenient and probably more expensive for such users if they were required to include addressing for separate access providers in addition to the customary Internet address normally employed by such users.[24]

---

[24] Competitive Impact Statement, United States v. AT&T Corp. and McCaw Cellular Communications, Inc., CA No. 94-01555 (D.D.C., Aug. 5, 1994) at 21-22.

The Justice Department concluded that the provision of packet data services in small and rural areas would be threatened because it would be difficult to justify the necessary investment in the additional switching or routing points. Precisely this type of economic distortion prompted the Justice Department to recommend that equal access requirements not be imposed on McCaw's cellular packet data services.

Equal access conversion may also thwart or delay the introduction of many AIN services, made possible by the wireless industry's common channel switching architecture (i.e., cellular's IS-41 network protocol). The Justice Department has recommended that some IS-41 features be classified as interexchange service and thus subject to the BOC-affiliates' equal access obligations.[25] As a result, BOC cellular affiliates are unable to provide certain AIN services to their cellular subscribers. The extension of equal access obligations to non-BOC cellular companies could as well prevent them from offering these new services.

The IS-41 "look ahead busy" function illustrates how imposing equal access on cellular licensees and other CMRS providers will threaten the development and deployment of innovative services and technologies. IS-41 permits cellular subscribers to "roam" among geographic areas served by different cellular providers and still have calls routed to their phones or

[25] See Letter from Richard L. Rosen, Chief, Communications and Finance Section, Antitrust Division, U.S. Department of Justice, to Michael K. Kellogg, Esq. at 3-5, dated Oct. 5, 1992.

to subscriber mailboxes if the phones are busy. Because this "look ahead busy" feature has been determined to constitute interexchange service, the BOC affiliates have not been able to offer it.[26] Application of equal access obligations to independent cellular licensees will thus affect the ability of cellular carriers to provide such innovative services to their subscribers.

Finally, the costs to implement equal access includes switch upgrades, billing upgrades, installation of trunks, and balloting and presubscription costs. And, as demonstrated by the conversion of the landline systems, even the most efficiently organized conversion will result in considerable customer confusion, allegations of "slamming," and other foreseeable problems.

For example, FCC imposition of equal access obligations for cellular carriers, will require the establishment of new service boundaries. These new service boundaries are in addition to the local access transport area ("LATA") boundaries established by

---

[26] Communications between the originating (home system) switch and the terminating switch for the purpose of call set-up have traditionally been performed by interexchange carriers, and it does not appear that the interLATA transport of such messages by the BOCs is necessary for the performance of their exchange or exchange access functions. Therefore, at this time, we are not prepared to conclude that these functions are permissible without a waiver. Similarly, we have not concluded that a BOC can provide routing or transport of queries on behalf of unaffiliated cellular carriers without a waiver.

Id. at 4.

the MFJ for local exchange, the Rural Service Areas ("RSAs")/Metropolitan Service Areas ("MSAs") established for cellular, Major Trading Areas ("MTAs")/Basic Trading Areas ("BTAs") developed for PCS, and service wide areas for ESMR.

Moreover, by establishing new service boundaries to govern the equal access requirements of cellular carriers, the Commission would be acting in contravention of Congressional intent to establish regulatory parity between all CMRS services.[27] Furthermore, because many CMRS services have not yet been designed or deployed, the Commission cannot be sure in drawing such artificial boundaries that they will be compatible with the way the service is offered and used by subscribers. As noted, establishing such boundaries will also prevent carriers from expanding the scope of their service areas and providing customers with toll-free services. Instead, carriers will be required to hand off traffic to other carriers, thereby imposing additional costs on subscribers.

## III. THE COMMISSION SHOULD NOT REQUIRE LOCAL EXCHANGE CARRIERS TO TARIFF INTERCONNECTION SERVICES PROVIDED TO CMRS PROVIDERS.

Long established and well considered doctrine commands that absent persistent, sustained market power, a firm is free to unilaterally choose to deal or decline to deal with others.[28] Therefore, a duty to deal is generally imposed only where the

---

[27] H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 259 (1993).

[28] See generally, United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

service provider would likely abuse the public if no legal protection were extended.[29] Once such services become available from multiple service providers, the duty to deal can be removed.[30] Consistent with this notion, the Commission in the Competitive Carrier docket concluded that non-dominant carriers are unlikely to participate in anticompetitive practices and, therefore, need not be subject to certain burdensome common carrier obligations.[31]

Policymakers and regulators alike have consistently refrained from imposing interconnection requirements on communications providers unless such providers exercise persistent, substantial market power.[32] Recognizing the

---

[29] See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 84 FCC 2d 445, 522 (1981).

[30] See id. at 521.

[31] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Notice of Inquiry and Notice of Proposed Rulemaking, 77 FCC 2d 308, 334-338 (1979); First Report and Order, 85 FCC 2d 1, 31 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, FCC No. 82-187, 47 Fed. Reg. 17,308 (1982); Second Report and Order, 91 FCC 2d 59 (1982); recon., 93 FCC 2d 54 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983), vacated, AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), rehearing en banc denied, January 21, 1993, upheld, MCI v. AT&T, 114 S. Ct. 2223 (1994); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 922 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984), recon., 59 Rad. Reg. 2d (P&F) 543 (1985); Sixth Report and Order, 99 FCC 2d 1020 (1985); reversed, MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

[32] A duty to deal with a competitor should be imposed only on a firm (or group of firms) that has a monopoly in the downstream market. Areeda & Hovenkamp, Antitrust Law, ¶ 736.2d (1993 Supp.). A concerted refusal to deal is not illegal in the

significant costs arising from establishing a duty to deal, decisionmakers have mandated interconnection where the regulated entity, such as the LECs, have bottleneck control over essential facilities.

The Commission's Notice now seeks comment on how best to administer the LEC requirement to interconnect with CMRS providers. Specifically, the Notice seeks comment on whether to require LECs to offer interconnection to CMRS providers under tariff, or whether to retain the current requirement that LECs establish, through good faith negotiations with CMRS providers, the rates, terms, and conditions of interconnection.[33] CTIA opposes the imposition of tariffed interconnection requirements and urges the Commission to retain the current procedure of good faith negotiations with CMRS providers.

### A. The Current System of Good Faith Negotiations Protects CMRS Providers Against Discrimination And Provides The Needed Flexibility To Compete In The Wireless Marketplace.

The Commission should apply the current procedures governing LEC interconnection with cellular carriers to interconnection with other CMRS providers. Despite some initial implementation problems,[34] the current system of good faith negotiations for cellular interconnection protects licensees against unreasonable discrimination and permits sufficient flexibility to accommodate

---

absence of market power. <u>Northwest Wholesale Stationers v. Pacific Stationary & Printing Co.</u>, 472 U.S. 284 (1985).

[33] Notice at para. 113.

[34] <u>See</u> <u>id.</u> at para. 102.

the various and diverse interconnection needs of numerous CMRS providers.[35]

Most LECs and cellular carriers are satisfied with the current negotiation process for interconnection with the public switched network, and find that the process generally produces fair and nondiscriminatory interconnection arrangements.[36] This is due, in large part, to the fact that the CMRS market comprises sophisticated buyers of access services with sufficient information and expertise to negotiate equitable interconnection arrangements.[37] And because of the requirements of Section 202 of the Communications Act[38] barring LEC provision of discriminatory service arrangements among its customers, less sophisticated buyers can take full advantage of pre-existing interconnection arrangements.[39] There is no reason to believe that this system of good faith negotiations cannot work equally well for other sophisticated purchasers of LEC interconnection services.

---

[35] See An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, 86 FCC 2d 469, 495 (1986) ("Cellular Interconnection Order").

[36] Notice at para. 114.

[37] Eastman Kodak Co. v. Image Technical Services, Inc., 112 S. Ct. 2072 (1992).

[38] 47 U.S.C. § 202.

[39] It is also interesting to note that the BOCs and other large communications service providers are eager to market their expertise to designated PCS licensees so that these providers are able to successfully negotiate in the competitive CMRS market. Jeanne Saddler, Baby Bells Offer Wireless Help To Small Firms, WALL ST. J., September 7, 1994, at B3.

The conventions governing cellular interconnection are well established, and can be easily adapted to the CMRS market. According to the guidelines first set forth by the Commission in 1986 and further refined in later decisions, all telephone companies are required to provide: (1) the type of interconnection requested by the cellular carrier; (2) interconnection to the nonwireline carrier that is not less favorable than that furnished to its affiliated wireline cellular carrier; and (3) reasonable interconnection arrangements with the nonwireline carrier that may not be the same as those used by the wireline cellular carrier.[40] Thus, the type and form of interconnection necessary for cellular providers and currently provided through negotiation, mirrors the interconnection requirements all CMRS providers will need.

While it is true that the period following the licensing of cellular service was marked by difficulties in the negotiation process,[41] these problems have largely abated. After nearly a decade of experience with the negotiation process, the customs

---

[40] The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 59 Rad. Reg. 2d (P & F) 1275 (1986) ("Policy Statement"). See also The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services (Cellular Interconnection Proceeding), Declaratory Ruling, 2 FCC Rcd 2910 (1987) ("Declaratory Ruling"); 4 FCC Rcd 2369 (1989) ("Cellular Reconsideration Order"). LECs are also subject to additional interconnection negotiation obligations.

In the CMRS Second Report, the Commission extended these requirements to LEC interconnection arrangements with CMRS providers. See CMRS Second Report, 9 FCC Rcd at 1497-1499.

[41] See Notice at para. 102.

and procedures pertaining to cellular interconnection are now well established and successful. Cellular companies and LECs have negotiated and implemented satisfactory interconnection agreements. Thus, the current cellular interconnection regulatory framework provides a degree of certainty with respect to the process of interconnection as well as to the respective rights of the parties.[42] Absent specific evidence of discrimination or unreasonable delay, there is no sound policy reason for replacing such a successful regulatory framework.

Retention of the current system of good faith negotiations also provides LECs and CMRS providers with the flexibility to negotiate specific interconnection arrangements tailored to their particular needs. Considering the differences in technical capabilities and network designs of various emerging commercial radio services, such flexibility is critical to their development and evolution. At this stage in the evolution of the wireless market, it is unclear how mobile services will develop. Flexibility thus becomes crucial both to enhance competition and to ensure continued diversity and innovation.[43]

---

[42] See Cellular Reconsideration Order, 4 FCC Rcd at 2371. The Commission's continued availability to assist in the resolution of interconnection problems also will be helpful.

[43] The same justifications underlying the Commission's repeated refusal to adopt generic standards for cellular interconnection applies here as well:

> The terms and conditions of the interconnection depend, of course, on innumerable factors peculiar to the cellular system, the local telephone network, and local regulatory policies; accordingly, we must leave the terms and conditions to be negotiated in good faith

Uniform tariffing requirements necessarily restrict the ability of LECs and CMRS providers to adapt to changing market and technological conditions. A negotiation process, on the other hand, allows participants to adjust easily and respond quickly to new developments, and thereby allows a more rapid introduction of new services to consumers.

The rationale for retaining the current system of negotiations is consistent with prior Commission decisions imposing tariffing obligations on the LECs. When the Commission mandated tariffing of switched and special expanded interconnection access offerings, there was no comprehensive regulatory framework in place to govern interconnection with competitive access providers.[44] In contrast, with CMRS interconnection, the Commission has established, and over the years clarified and modified, the regulatory procedures for LEC interconnection with cellular systems, which can easily be

---

between the cellular operator and the telephone company.

Policy Statement, 59 Rad. Reg. 2d (P&F) at 1284. See also Cellular Interconnection Order, 86 FCC 2d at 496 ("The particular point of interconnection of a given cellular system will be dependent upon the design of the system and other factors which may vary from case to case, however").

[44] See Expanded Interconnection with Local Telephone Company Facilities and Amendment of the Part 69 Allocation of General Support Facility Costs, 7 FCC Rcd 7369 (1992) ("Expanded Interconnection Special Access Order"); Expanded Interconnection with Local Telephone Company Facilities and Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 8 FCC Rcd 7374 (1993) ("Expanded Interconnection Switched Access Order"); vacated in part and remanded, Bell Telephone Companies, et al. v. FCC, No. 92-1620 (D.C. Cir. June 10, 1994); Remand Order, FCC 94-190 (released July 25, 1994).